Supreme Court, U.S.
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No. 01-157

In The
Supreme Court of the United States

TURNER O. WILEY,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On Petition for a *Writ* of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A *WRIT* OF *CERTIORARI*

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QUESTION PRESENTED

Respondent objects to Petitioner's statement of the Question Presented because it ignores the holding of this Court in Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972). Under that decision, the Question Presented in this matter should be:

Whether the federal courts have original subject matter jurisdiction pursuant to 28 U.S.C. § 1332 over a cause of action alleging a violation of the North Carolina Retaliatory Employment Discrimination Act, N.C. Gen. Stat. §§ 95-240 to -245 (1999), where the parties are citizens of different states and the amount in controversy exceeds $75,000.

PARTIES TO THE PROCEEDING

United Parcel Service, Inc, is a privately held corporation incorporated under the laws of the State of Ohio. United Parcel Service, Inc. is a wholly-owned subsidiary of United Parcel Service, Inc., a corporation incorporated under the laws of the State of Delaware. United Parcel Service, Inc. (Delaware) is a publicly traded company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

A. The District Court Proceedings 2

B. The Appellate Proceedings 3

SUMMARY OF ARGUMENT 5

REASONS FOR DENYING WILEY'S PETITION 6

A. The Relevant Question in this Case is Whether The Federal Courts Would Have Had Original Subject Matter Jurisdiction Over Wiley's Claim If That Claim Had Been Filed Originally in Federal District Court 6

B. The Federal Courts Would Have Had Original Subject Matter Jurisdiction Over This Action If It Had Been Filed In Federal Court Initially 11

C. There Is No Split Among The Circuits Regarding Whether A Party Who Fails To Object To A District Court That Removal Is Improper Under 28 U.S.C. § 1445 Waives The Right To Assert Such An Objection On Appeal 15

D. The Question Presented Is Not An Important Matter In Need Of The Court's Attention 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES ..... **Page**

Armistead v. C & M Transport, Inc.,
49 F.3d 43 (1st Cir. 1995) 17, 18, 19
Ayers v. ARA Health Servs., Inc.,
918 F.Supp. 143 (D. Md. 1995) 15-16
Barber v. Pepsi-Cola Personnel, Inc.,
78 F.Supp.2d 683 (W.D. Mich. 1999) 15
Barrerea v. Con Agra, Inc.,
244 F.3d 663 (8th Cir. 2001) 14
Bausman v. Interstate Brands Corp.,
252 F.3d 1111 (10th Cir. 2001) 14
Bearden v. PNS Stores, Inc.,
894 F.Supp. 1418 (D. Nev. 1995) 16
Blackwell v. Shelter Mut. Ins. Co.,
109 F.3d 1550 (10th Cir. 1997) 14
Carpenter v. Baltimore & O.R. Co.,
109 F.2d 375 (6th Cir. 1940) 15
Caterpillar Inc. v. Lewis,
519 U.S. 61 (1996) 6, 9, 10, 11, 15, 17, 18, 19
Feichko v. Denver & Rio Grande W. R. Co.,
213 F.3d 586 (10th Cir. 2000),
cert. denied, 121 S.Ct. 766 (2001) 15
Grubbs v. General Electric Credit Corp.,
405 U.S. 699 (1972) ..... i, 5, 6, 8, 9, 10, 11,
..... 15, 16, 18, 19
Gunn v. Fisher of Ala.,
No. CV 93-B-1847-S, 1996 U.S. Dist. LEXIS 20952
(N.D. Ala. Mar. 24, 1994) 16

Hill v. N. C. Dep't. of Correction,
No. 5:98-CV-429-BO(2),
1999 U.S. Dist. LEXIS 5639 (E.D. N.C. Feb. 24, 1999),
aff'd, 201 F.3d 436 (4th Cir. 1999) 14
Home Indem. Co. v. Moore,
499 F.2d 1202 (8th Cir. 1974) 13
Horton v. Liberty Mut. Ins. Co.,
367 U.S. 348 (1961) 5, 12, 14, 18, 21
Humphrey v. Sequentia, Inc.,
58 F.3d 1238 (8th Cir. 1995) 16, 17, 18
Hurt v. Dow Chemical Co.,
963 F.2d 1142 (8th Cir. 1992) 17, 18, 19
Jackson v. Consolidation Coal Co.,
21 F.3d 422 (Table),
1994 U.S. App. LEXIS 5190 (4th Cir. Mar. 22, 1994) 14
Johnson v. Pepperidge Farm, Inc.,
23 F.3d 401 (Table),
1994 U.S. App. LEXIS 6968 (4th Cir. Apr. 4, 1994) 14
Kidd v. Commonwealth Bolt, Inc.,
2 F.3d 1149 (Table), 1993 U.S. App. LEXIS 20649
(4th Cir. Aug. 13, 1993) 14
Lirette v. N.L. Sperry Sun, Inc.,
820 F.2d 116 (5th Cir. 1987) 15
McRae v. Robeson County Group Homes, No.,
3:94-CV-17-BR (1), 1997 U.S. Dist. LEXIS 9668
(E.D.N.C. June 20, 1997) 14
Moffitt v. Transit Mgmt.,
8 F.3d 819 (Table), 1993 U.S. App. LEXIS 27629
(4th Cir. Oct. 22, 1993) 14

Munoz v. H & M Wholesale, Inc.,
926 F.Supp. 596 (S.D. Tex. 1996) 14
Nielsen v. Weeks Marine, Inc.,
910 F.Supp. 84 (E.D.N.Y. 1995) 16
Phillips v. Ford Motor Co.,
No. 94-0632-CV-W-2,
1995 WL 866224 (W.D. Mo. May 1, 1995) 14
Pope v. Bethesda Health Ctr., Inc.,
813 F.2d 1306 (4th Cir. 1987) 14
Porter v. United States Alumoweld Co.,
125 F.3d 243 (4th Cir. 1997) 14
Prescott v. United States,
523 F.Supp. 918 (D. Nev. 1981),
aff'd, 731 F.2d 1388 (9th Cir. 1984) 14
Ramirez v. IBP, Inc.,
913 F.Supp. 1421 (D. Kan. 1995) 15
Razor v. Perdue Farms, Inc.,
176 F.3d 475 (Table),
1999 U.S. App. LEXIS 5924 (4th Cir. Apr. 1, 1999) 14
Reed v. Heil Co.,
206 F.3d 1055 (11th Cir. 2000) 17, 18, 19
Sanhueza v. Dillard Dep't Stores, Inc.,
178 F.3d 1285 (Table),
1999 U.S. App. LEXIS 8263 (4th Cir. Apr. 29, 1999) 14
Sayers v. ABB C-E Servs., Inc.,
Civil No. 4:97CV37, 1997 U.S. Dist. LEXIS 18304
(W.D. N.C. Oct. 15, 1997) 14
Sherrod v. Am. Airlines, Inc.,
132 F.3d 1112 (5th Cir. 1998) 4

Stover v. Lincoln Pub. Co.,
73 F.3d 358 (Table), 1995 U.S. App. LEXIS 37129
(4th Cir. Dec. 28, 1995) 14
St. Paul Ins. Co. v. Trejo,
39 F.3d 585 (5th Cir. 1994) 13
Suder v. Blue Circle, Inc.,
116 F.3d 1351 (10th Cir. 1997) 17, 18, 19
Swearingen v. Owens-Corning Fiberglas Corp.,
968 F.2d 559 (5th Cir. 1992) 14
TIG Ins. Co. v. Deaton, Inc.,
932 F.Supp. 132 (W.D. N.C. 1996) 13
Torsky v. Avon Prods., Inc.,
707 F.Supp. 942 (W.D. Mich. 1988) 15
United States Fid. & Guar. Co. v. McAuliffe,
No. CIV.A. 94-4431,
1996 U.S. Dist. LEXIS 433 (E.D. Pa. Jan. 18, 1996) 15
Wiley v. United Parcel Service, Inc.,
No. 99-2277 (4th Cir. Apr. 27, 2001) 5, 19
Williams v. AC Spark Plugs Div. of Gen. Motors Corp.,
985 F.2d 783 (5th Cir. 1993) 15, 17, 18

STATUTES

28 U.S.C. § 1292(a) 16
28 U.S.C. §§ 1330-1368 9
28 U.S.C. § 1331 16
28 U.S.C. § 1332 ..... i, 2, 5, 6, 9, 12, 13, 14, 15, 21
28 U.S.C. § 1332(a) 11, 12, 13
28 U.S.C. § 1332(c)(1) 12
28 U.S.C. § 1441(a) 7, 18

28 U.S.C. § 1445 ..... 5, 7, 15, 20
28 U.S.C. § 1445(a) 15, 16
28 U.S.C. § 1445(c) 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 21
28 U.S.C. § 1447(c) 4, 7, 11, 18
45 U.S.C. §§ 51-60 7
49 U.S.C. § 11706 7
49 U.S.C. § 14706 7

§ 40302 of the Violence Against Women Act of 1994 7

N.C. Gen. Stat. §§ 95-240 to -245 ..... i, 2

H.R. Rep. No. 100-889 (1988), reprinted in 1988 U.S.C.C.A.N. 5982 8

Rule 10, Rules of the Supreme Court of the United States 20

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A *WRIT* OF *CERTIORARI*

Respondent United Parcel Service, Inc. respectfully opposes Petitioner Turner Wiley's Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

A. The District Court Proceedings

On April 10, 1997, Petitioner Turner O. Wiley ("Wiley") filed a complaint with the North Carolina Department of Labor asserting that Respondent United Parcel Service, Inc. ("UPS") had retaliated against him for pursuing workers' compensation benefits in violation of the North Carolina Retaliatory Employment Discrimination Act, N.C. Gen. Stat. §§95-240 to –245 (1999) ("REDA").[1] The Department of Labor subsequently issued a right-to-sue letter to Wiley on October 31, 1997.

On January 7, 1998, Wiley initiated this action by filing a civil complaint against UPS in the General Court of Justice, Superior Court Division, of Guilford County, North Carolina, alleging that UPS had retaliated against him in violation of REDA.

On February 9, 1998, UPS removed this case to the United States District Court for the Middle District of North Carolina pursuant to 28 U.S.C. § 1332. As stated in UPS's Notice of Removal, Wiley is a citizen and resident of the State of North Carolina and UPS is not a citizen of the State

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[1] REDA is a general anti-retaliation provision that prohibits employers in North Carolina from discriminating or retaliating against employees who exercise rights under North Carolina's workers' compensation statute, wage and hour statute, occupational safety and health statute, mine safety and health statute, National Guard reemployment rights statute, genetic testing/information anti-discrimination statute, or its statute prohibiting discrimination against individuals with the sickle cell trait or the hemoglobin C trait. N.C. Gen. Stat. § 95-241.

of North Carolina. Moreover, Wiley sought reinstatement; compensatory damages for lost wages, benefits and other economic losses from his termination on April 9, 1997 until his reinstatement; treble compensatory damages; and attorneys' fees.

Wiley never filed a motion to remand this action to state court, and never presented any objection of any kind to the District Court regarding this removal or the District Court's jurisdiction over this matter.

After the conclusion of discovery, UPS filed a motion for summary judgment with respect to Wiley's REDA claim. On August 17, 1999, the Honorable William L. Osteen, Sr. granted this motion and dismissed Wiley's lawsuit.

B. The Appellate Proceedings

On September 13, 1999, Wiley filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. On January 31, 2000, in his brief on appeal to the Fourth Circuit, Wiley objected for the first time to UPS's removal of this case and to the jurisdiction of the District Court. In this brief, Wiley argued that this case had been removed improperly in violation of 28 U.S.C. §1445(c) because his REDA claim "arises under" North Carolina's workers' compensation laws.

On April 27, 2001, in a *per curiam* decision, the Fourth Circuit affirmed the District Court's decision granting summary judgment to UPS. With regard to Wiley's argument that this case had been removed improperly, the Fourth Circuit held that Wiley had waived the right to object to the removal by failing to file a motion to remand or

otherwise raise this objection in the District Court. Specifically, the Fourth Circuit held:

> Even if Wiley's retaliation claim did arise under North Carolina's workers' compensation laws, Wiley nevertheless waived his right to object to the removal. Under 28 U.S.C. § 1447(c) a "motion to remand [a] case on the basis of any defect *other than lack of subject matter jurisdiction* must be made within 30 days after the filing of the notice of removal." (emphasis added). Thus, § 1447(c) provides that a party who fails to note a non-jurisdictional objection within 30 days of the notice of removal waives the objection. Violations of 28 U.S.C. § 1445(c) have been held to constitute procedural, and not jurisdictional, defects. *See, e.g. Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1117 (5th Cir. 1998); *Ayers v. ARA Health Servs., Inc.*, 918 F.Supp. 143, 146-7 (D. Md. 1995). Accordingly, a party seeking to invoke § 1445(c) must object to removal within thirty days after the filing of a notice of removal. Here, Wiley failed to object to UPS's removal of this suit in a timely manner. UPS filed its notice of removal on February 9, 1998. Wiley, however, did not object until the initiation of this appeal on September 13, 1999. Because his objection was made over thirty days after removal, he has waived his argument for improper removal.

Wiley v. United Parcel Service, Inc., No. 99-2277, slip op. at 3-4 (4th Cir. Apr. 27, 2001).

Wiley filed the instant Petition for Writ of Certiorari on July 25, 2001.

SUMMARY OF ARGUMENT

This case presents the simple question of whether a plaintiff can waive his right to chose between state and federal court by failing to object to removal pursuant to 28 U.S.C. § 1445 in a case allegedly arising under the workers' compensation laws of a state. Wiley mis-states the Question Presented in this case as whether, under 28 U.S.C. § 1445(c) and the Tenth Amendment, federal courts have subject matter jurisdiction over cases removed from state court that arise under a state's workers' compensation laws. This Question Presented reflects a fundamental misunderstanding of the difference between the concepts of subject matter jurisdiction and removal, and completely ignores this Court's holding in Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972). In Grubbs, the Court held that if a removed case originally could have been filed in federal district court, then a party who fails to object to removal prior to the entry of a judgment in the case in federal court cannot object to removal on appeal. Thus, the Question Presented in this case is whether Wiley's claim originally could have been brought in federal court.

In Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961), the Court held that cases arising under the workers' compensation laws of a state can be brought originally in federal court if the requirements of 28 U.S.C. § 1332 are

satisfied. Because it is undisputed that the requirements of 28 U.S.C. § 1332 are satisfied in this case, Wiley originally could have filed this action in federal district court. Therefore, the Fourth Circuit correctly held that Wiley waived his objection under 28 U.S.C. § 1445(c).

In addition to being incorrect on the merits, Wiley's Petition fails to identify any reason why the Court should accept this case. There is no conflict among the circuits on the issue decided by the Fourth Circuit. Moreover, even if a conflict did exist, this issue is not of sufficient importance to justify this Court's attention. Indeed, contrary to Wiley's misplaced attempts to cast this case as a dangerous assault on federalism and the Tenth Amendment, this dispute actually involves nothing more than the waivability of a plaintiff's right to chose between a state and a federal court, both of whom have subject matter jurisdiction, in cases arising under the workers' compensation laws of a state.

REASONS FOR DENYING WILEY'S PETITION

A. The Relevant Question In This Case Is Whether The Federal Courts Would Have Had Original Subject Matter Jurisdiction Over Wiley's Claim If That Claim Had Been Filed Originally In Federal District Court

In Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972) and Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996), the Court made clear that, when an action removed from state court has been tried in federal district court, there can be no further objection to the removal of that action if the case originally could have been filed in a federal court. Wiley's

REDA claim against UPS is an action removed from state court that has been tried to its conclusion in federal district court. As a result, the only issue for determination in this case is whether a federal district court would have had jurisdiction over Wiley's REDA claim if he originally had filed that claim in such a court.

Section 1441(a) of Title 28 of the United States Code provides that, "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . ." to the appropriate federal district court. Section 1445 of Title 28 lists four (4) categories of cases that are "nonremovable": (a) a civil action in any state court against a railroad arising under 45 U.S.C. §§ 51-60; (b) a civil action in any state court against a carrier to recover damages for delay, loss, or injury of shipments arising under 49 U.S.C. §§ 11706 or 14706 (unless the amount in controversy exceeds $10,000); (c) a civil action in any state court arising under the workmen's compensation laws of such state; and (d) a civil action in any state court arising under § 40302 of the Violence Against Women Act of 1994.

Section 1447(c) of Title 28 provides that "[a] motion to remand [a] case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . . ." The legislative history of § 1447(c) makes clear that Congress intended this 30-day limit to apply to any removal defect other than a lack of subject matter jurisdiction:

> So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between the two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction.

H.R. Rep. No. 100-889, at 72 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6033.

Consistent with this statutory language and legislative history, this Court held almost thirty (30) years ago that a party cannot object to removal of a case for the first time on appeal if the district court that heard the case would have had original jurisdiction over the case had it been filed in that court in the first place. See Grubbs, 405 U.S. 699. In Grubbs, the Court was presented with a multi-party case in which, after the commencement of the action in state court, the original defendant filed a cross claim against the United States. The United States removed the action to federal court and there was no objection to this removal. The case was then tried in its entirety in federal court. On appeal, the Fifth Circuit Court of Appeals questioned *sua sponte* the propriety of the removal and the jurisdiction of the district court. After

concluding that the removal was not authorized by statute, the Fifth Circuit remanded the case to state court.

In reversing the Fifth Circuit's decision to remand the case to state court, this Court held as follows:

> Longstanding decisions of this Court make clear, however, that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Id. at 702. In other words, a party who does not object to removal before an adjudication on the merits waives any such objection so long as the case originally could have been filed in federal district court pursuant to Chapter 85 of Title 28 of the United States Code, 28 U.S.C. §§ 1330-1368, or to some other relevant federal jurisdictional statute. Applying this doctrine to the facts before it, the Court concluded that, because the parties were citizens of different states, and because the amount in controversy was sufficient, the district court would have had original jurisdiction over this matter pursuant to 28 U.S.C. § 1332 had it been filed in that court initially. As a result, under the circumstances, the parties could not object to the improper removal for the first time on appeal.

In Caterpillar, 519 U.S. 61, the Court was asked to address the propriety of a removal from state court in a

slightly different context. This case involved a state law claim that had been removed from state court based on diversity jurisdiction even though, at the time of removal, it was undisputed that complete diversity did not exist between the parties. Unlike in Grubbs, however, there was no waiver because the plaintiff in Caterpillar filed a timely motion to remand. After the motion to remand was denied, but prior to trial, the non-diverse party was dismissed from the action. Thus, the district court did not have diversity jurisdiction over the case at the time of the improper removal but it did at the time of trial. On appeal, the plaintiff argued that the removal was improper and that he had preserved his right to object to that removal on appeal by filing a timely motion to remand in the district court. The Sixth Circuit Court of Appeals agreed and vacated the judgment of the district court.

This Court disagreed with the plaintiff's arguments and reversed the decision of the Sixth Circuit. Once again, the Court emphasized the distinction between jurisdiction and removability. As in Grubbs, the Court held that, in cases where a judgment has been entered by the district court, the question on appeal is not whether removal was proper, but, instead, whether the district court had original subject matter jurisdiction over the case at the time that it entered a judgment. If it did, even if the underlying removal was improper and even if the plaintiff filed a timely motion to remand, "considerations of finality, efficiency, and economy become overwhelming" and prohibit remand of the case. Caterpillar, 519 U.S. at 75.

In summary, in Grubbs, the Court established that a party who fails to raise an objection to removal before an

adjudication on the merits in the district court waives the right to make any such objection provided that the case originally could have been filed in federal court.[2] In Caterpillar, the Court held that, even if a party does object to removal in a timely manner, once the case has been adjudicated on the merits by the district court, concerns of finality, judicial economy and efficiency preclude the parties from raising such objections on appeal provided that the case originally could have been filed in federal court. Because Wiley's REDA claim has been litigated to its conclusion in the United States District Court for the Middle District of North Carolina, and because he did not object to removal until after judgment was entered against him, both of these cases, albeit for different reasons, preclude Wiley from objecting on appeal to the removal of this case to federal court ***unless*** this case could not have been brought in federal court by Wiley in the first place.

B. The Federal Courts Would Have Had Original Subject Matter Jurisdiction Over This Action If It Had Been Filed In Federal Court Initially

Section 1332(a) of Title 28 of the United States Code provides that federal district courts "shall have original

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[2] Grubbs appears to leave open the question of whether a party who fails to object to removal within thirty (30) days as required by 28 U.S.C. § 1447(c), but who does object prior to an adjudication on the merits by the district court, waives the right to raise non-jurisdictional objections to removal thereafter. As the cases discussed below illustrate, it is this question that has led to some apparent inconsistency among the circuit courts. This question is not relevant to Wiley's Petition, however, because Wiley did not object to removal in this case until after the District Court granted UPS's motion for summary judgment and dismissed Wiley's Complaint.

jurisdiction of ***all*** civil actions" where the matter in controversy exceeds $75,000 (exclusive of interest and costs) and is between citizens of different states. (emphasis added). For purposes of this rule, a corporation is deemed to be a citizen of any state in which it has been incorporated and of the state where it maintains its principal place of business. 28 U.S.C. § 1332(c)(1).

In this case, it is not disputed that the requirements of 28 U.S.C. § 1332 are satisfied. Wiley is a citizen of the State of North Carolina and UPS is not. Further, because Wiley seeks reinstatement; compensatory damages for lost wages, benefits, and other economic losses from the date of his termination on April 9, 1997 until his reinstatement in February 1999; treble compensatory damages under REDA; and attorneys' fees, this case easily satisfies § 1332(a)'s amount in controversy requirement.

Because the requirements of 28 U.S.C. § 1332(a) are satisfied, it is beyond question that Wiley's REDA claim falls within the original subject matter jurisdiction of the federal district courts. The only possible argument to the contrary – that 28 U.S.C. § 1445(c) supersedes 28 U.S.C. § 1332(a) in cases "arising under the workmen's compensation laws" of a state – was heard and rejected by this Court forty (40) years ago. In Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961), the Court explicitly rejected the argument that 28 U.S.C. § 1445(c) not only prohibited removal of workers' compensation actions to federal court, but also meant that such actions could not be filed originally in federal court. Specifically, the Court stated:

> The foregoing are some of the appealing considerations that led the District Court to conclude that it would frustrate the congressional purpose to permit insurers to file workmen's compensation suits in federal courts when Congress had deliberately provided that such suits could not be removed to federal courts if filed by claimants in state courts. But after the most deliberate study of the whole problem by lawyers and judges and after its consideration by lawyers on the Senate Judiciary Committee in the light of statistics on both removals and original filings, Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth.

Id. at 352 (footnote omitted); see St. Paul Ins. Co. v. Trejo, 39 F.3d 585, 587-88 (5th Cir. 1994) (district court erred in concluding that § 1445(c) prevented party from filing workers' compensation action in federal court where diversity jurisdiction existed); Home Indem. Co. v. Moore, 499 F.2d 1202, 1204-05 (8th Cir. 1974) (28 U.S.C. §1445(c) not relevant to existence of diversity jurisdiction under 28 U.S.C. § 1332); TIG Ins. Co. v. Deaton, Inc., 932 F. Supp.

132, 136 (W.D. N.C. 1996) (§1 445(c) is irrelevant in actions originally filed in federal court); Prescott v. United States, 523 F. Supp. 918, 939 (D. Nev. 1981) ("It is well-settled that although Title 28 U.S.C. § 1445(c) prevents workmen's compensation suits from being removed to federal court if filed by claimants in state courts, such suits may still be filed in federal court pursuant to Title 28 U.S.C. § 1332 if there is diversity of citizenship and the amount in controversy is in excess of [the statutory amount], exclusive of interest and costs."), aff'd, 731 F.2d 1388 (9th Cir. 1984).[3]

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[3] Consistent with Horton, federal courts routinely hear workers' compensation claims initially filed in federal court pursuant to 28 U.S.C. § 1332. See, e.g., Bausman v. Interstate Brands Corp., 252 F.3d 1111 (10th Cir. 2001); Barrera v. Con Agra, Inc., 244 F.3d 663 (8th Cir. 2001); Sanhueza v. Dillard Dep't Stores, Inc., 178 F.3d 1285 (Table), 1999 U.S. App. LEXIS 8263 (4th Cir. Apr. 29, 1999); Razor v. Perdue Farms, Inc., 176 F.3d 475 (Table), 1999 U.S. App. LEXIS 5924 (4th Cir. Apr. 1, 1999); Porter v. United States Alumoweld Co., 125 F.3d 243 (4th Cir. 1997); Blackwell v. Shelter Mut. Ins. Co., 109 F.3d 1550 (10th Cir. 1997); Stover v. Lincoln Pub. Co., 73 F.3d 358 (Table), 1995 U.S. App. LEXIS 37129 (4th Cir. Dec. 28, 1995); Johnson v. Pepperidge Farm, Inc., 23 F.3d 401 (Table), 1994 U.S. App. LEXIS 6968 (4th Cir. Apr. 4, 1994); Jackson v. Consolidation Coal Co., 21 F.3d 422 (Table), 1994 U.S. App. LEXIS 5190 (4th Cir. Mar. 22, 1994); Kidd v. Commonwealth Bolt, Inc., 2 F.3d 1149 (Table), 1993 U.S. App. LEXIS 20649 (4th Cir. Aug. 13, 1993); Moffitt v. Transit Mgmt., 8 F.3d 819 (Table), 1993 U.S. App. LEXIS 27629 (4th Cir. Oct. 22, 1993); Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559 (5th Cir. 1992); Pope v. Bethesda Health Ctr., Inc., 813 F.2d 1306 (4th Cir. 1987); Hill v. N. C. Dep't. of Correction, No. 5:98-CV-429-BO(2), 1999 U.S. Dist. LEXIS 5639 (E.D. N.C. Feb. 24, 1999), aff'd, 201 F.3d 436 (4th Cir. 1999); Sayers v. ABB C-E Servs., Inc., No. 4:97CV37, 1997 U.S. Dist. LEXIS 18304 (W.D. N.C. Oct. 14, 1997); McRae v. Robeson County Group Homes, No. 3:94-CV-17-BR (1), 1997 U.S. Dist. LEXIS 9668 (E.D. N.C. June 20, 1997); Munoz v. H & M Wholesale, Inc., 926 F. Supp. 596 (S.D. Tex. 1996); Phillips v. Ford Motor Co., No. 94-0632-CV-W-2, 1995 WL 866224 (W.D. Mo.

Because 28 U.S.C. § 1445(c) does not affect the original subject matter jurisdiction of the federal district courts under 28 U.S.C. § 1332, and because Wiley's REDA claim satisfies the requirements of 28 U.S.C. § 1332, Wiley could have filed this action originally in federal district court. Consequently, under both Grubbs and Caterpillar, the Fourth Circuit correctly held that Wiley cannot object to the propriety of UPS's removal of this case on appeal.

C. There Is No Split Among The Circuits Regarding Whether A Party Who Fails To Object To A District Court That Removal Is Improper Under 28 U.S.C. § 1445 Waives The Right To Assert Such An Objection On Appeal

Every federal court that has directly addressed a party's failure to object to a district court that a removal is improper under 28 U.S.C. § 1445 has held that such a party waives the right to object to removal on appeal. Williams v. AC Spark Plugs Div. of Gen. Motors Corp., 985 F.2d 783, 786-88 (5th Cir. 1993) (28 U.S.C. § 1445(c)); Feichko v. Denver & Rio Grande W. R. Co., 213 F.3d 586, 589 (10th Cir. 2000) (28 U.S.C. § 1445(a)), cert. denied, 121 S.Ct. 766 (2001); Lirette v. N.L. Sperry Sun, Inc., 820 F.2d 116, 117-18 (5th Cir. 1987) (28 U.S.C. §1445(a)); Carpenter v. Baltimore & O.R. Co., 109 F.2d 375, 379-80 (6th Cir. 1940) (28 U.S.C. § 1445(a)); Barber v. Pepsi-Cola Personnel, Inc., 78 F. Supp.2d 683, 694-95 (W.D. Mich. 1999) (28 U.S.C. § 1445(c)); United States Fid. & Guar. Co. v. McAuliffe, No. CIV.A. 94-4431, 1996 U.S. Dist. LEXIS 433, at *18-19 (E.D. Pa. Jan. 18, 1996) (28 U.S.C. § 1445(c)); Ayers v.

May 1, 1995); Ramirez v. IBP, Inc., 913 F. Supp. 1421 (D. Kan. 1995); Torsky v. Avon Prods., Inc., 707 F.Supp. 942 (W.D. Mich. 1988).

ARA Health Servs., Inc., 918 F. Supp. 143, 146-47 (D. Md. 1995) (28 U.S.C. §1445(c)); Nielsen v. Weeks Marine, Inc., 910 F. Supp. 84, 87 (E.D.N.Y. 1995) (28 U.S.C. § 1445(a)); Bearden v. PNS Stores, Inc., 894 F. Supp. 1418, 1422-23 (D. Nev. 1995) (28 U.S.C. § 1445(c)); Gunn v. Fisher of Ala., No. CV 93-B-1847-S, 1996 U.S. Dist. LEXIS 20952, at *3 (N.D. Ala. Mar. 24, 1994) (28 U.S.C. § 1445(c)).

The cases cited by Wiley for the proposition that the Fourth Circuit's decision in this case is in conflict with decisions of other circuits are inapposite because they do not directly address the question at issue. The case most prominently cited by Wiley in support of this contention is Humphrey v. Sequentia, Inc., 58 F.3d 1238 (8th Cir. 1995). Humphrey is not inconsistent with the Fourth Circuit's decision in this case. Indeed, Humphrey does not even address the issue decided by the Fourth Circuit in its denial of Wiley's appeal. In Humphrey, the plaintiff filed suit in state court alleging a violation of Missouri's workers' compensation retaliation statute. The defendant removed the case to federal court pursuant to 28 U.S.C. § 1331 based on the argument that the plaintiff's claim was preempted by federal law. Unlike Wiley and the plaintiff in Grubbs, the plaintiff in Humphrey filed a timely motion to remand in which he argued that removal was improper because there was no federal question jurisdiction and because 28 U.S.C. § 1445(c) precluded removal. The district court denied this motion and the plaintiff immediately appealed pursuant to 28 U.S.C. § 1292(a).

In its decision remanding this case to state court, the Eighth Circuit held that the plaintiff's case did not present a federal question because his state law claim was not

preempted by federal law and that, under 28 U.S.C § 1445(c), a claim for workers' compensation retaliation under Missouri law was not removable because it "arose under" the workers' compensation laws of the State of Missouri. Significantly, the Eighth Circuit did not address, and was not presented with, the waiver question at issue in this case because Humphrey filed a timely motion to remand in the district court arguing that removal was improper pursuant to 28 U.S.C. § 1445(c).[4] Thus, the Eighth Circuit's decision in Humphrey does not conflict with the Fourth Circuit's decision in this case.

Wiley's reliance upon Armistead v. C & M Transport, Inc., 49 F.3d 43 (1st Cir. 1995), Suder v. Blue Circle, Inc., 116 F.3d 1351 (10th Cir. 1997), and Reed v. Heil Co., 206 F.3d 1055 (11th Cir. 2000) to establish the existence of a conflict among the circuits is similarly unavailing. In Armistead, the First Circuit explicitly refused to decide whether the plaintiff's failure to assert that removal was improper pursuant to 28 U.S.C. § 1445(c) in a timely motion to remand resulted in a waiver of that objection.[5] 49 F.3d

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[4] Moreover, even though Caterpillar was not decided until more than a year after Humphrey, the "considerations of finality, efficiency, and economy" identified by this Court in Caterpillar would not have dictated a different result in Humphrey because, in that case, the removal issue was presented to the Eighth Circuit via an interlocutory appeal rather than after the case had been tried and resolved on the merits by the district court.

[5] Although not mentioned by Wiley in his Petition, the First Circuit in Armistead noted the existence of a perceived conflict on the issue of waiver between the Fifth Circuit's decision in Williams v. AC Spark Plugs Div. of Gen. Motors Corp., 985 F.2d 783 (5th Cir. 1993) and the Eighth Circuit's decision in Hurt v. Dow Chemical Co., 963 F.2d 1142 (8th Cir. 1992). There is no conflict between these two cases,

at 46. Instead, the First Circuit decided that removal was improper because, even if the plaintiff had waived this objection, the district court lacked original subject matter jurisdiction for a completely separate reason (i.e., because the case was not a "civil action" capable of being removed under 28 U.S.C. § 1441(a)). Id.

Wiley's reliance upon Suder for the proposition that a conflict exists among the circuits regarding the effect of a failure to object to removal is even more attenuated. In Suder, the employer removed a workers' compensation retaliation case from state court and the plaintiff filed a timely motion to remand in which he argued that removal was improper under 28 U.S.C. § 1445(c). The district court granted this motion and awarded fees and costs to the plaintiff. The only issue presented to or decided by the Tenth Circuit on appeal was the propriety of the district court's decision to assess attorneys' fees against the employer.

Finally, Wiley's reliance upon Reed to illustrate that the Fourth Circuit's resolution of this case creates a split among the circuits also is misplaced. In Reed, the plaintiff filed a workers' compensation retaliation claim in state court. The employer then removed the claim to federal court and

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however, that is relevant here. Both cases involve situations where the plaintiff failed to object to removal within thirty (30) days as required by 28 U.S.C. § 1447(c) but, in both cases, the plaintiff did object in the district court prior to a full adjudication on the merits. The Fifth Circuit in Williams extended the holding of Grubbs to find a waiver under these circumstances while the Eighth Circuit in Hurt did not. To the extent that a conflict between these two cases still exists after this Court's subsequent decision in Caterpillar, that conflict is not relevant to this case because Wiley's circumstances, and the Fourth Circuit's decision, both fall squarely within this Court's decisions in Grubbs and Horton.

the plaintiff "tried unsuccessfully to have the case remanded to state court." 206 F.3d at 1058. The plaintiff then argued on appeal that the district court lacked "subject matter jurisdiction" to hear his claim because it had been improperly removed. Id.

In agreeing with this argument, the Eleventh Circuit Court of Appeals did not discuss, and appears not to have been presented with, the waiver analysis set forth in Grubbs and followed by the Fourth Circuit in this case. A simple review of that analysis, however, easily explains the difference in outcomes between Reed and this case. In Grubbs, this Court held that, in a case falling within the original subject matter jurisdiction of the federal district courts, a party who fails to object to removal prior to the entry of judgment by a district court waives any and all such objections. Unlike Wiley, the plaintiff in Reed did not fail to object to removal prior to the entry of judgment by the district court and, therefore, did not waive any objections that he might have had to removal. Thus, no conflict exists between Wiley and Reed on this question.[6]

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[6] Reed also failed to cite the Court's decision in Caterpillar or to discuss the judicial economy rationale set forth therein. In doing so, the Eleventh Circuit reached a result that appears to be in conflict with Caterpillar. To the extent that such a conflict does exist, it is not one that appears at this time to require intervention by the Court because there is no reason to believe that the Eleventh Circuit will not follow Caterpillar if and when the issue is properly presented to it. In other words, there is no reason to believe that, if this conflict really exists, it will not resolve itself in due course. More important, however, is the fact that no conflict exists between Reed and the Fourth Circuit's decision in this case. As discussed above, the Fourth Circuit's holding in this case is based on the waiver doctrine and not on the judicial economy concerns expressed in Caterpillar.

In summary, starting with this Court's decision in Grubbs, the federal courts that have directly addressed the question are in agreement that a plaintiff in a case that originally could have been filed in federal court who fails to object to removal prior to the entry of a judgment waives any objection to removal – including an objection based on 28 U.S.C. §1445. As a result, there is no conflict among the circuits on this question and Wiley's Petition should be denied.

D. The Question Presented Is Not An Important Matter In Need Of The Court's Attention

Rule 10 of the Rules of the Supreme Court of the United States provides that one consideration that may guide the Court's discretion in granting a petition for a writ of certiorari is the existence of a conflict among the circuits on an "important matter". As noted above, the Petition presently before the Court should be denied because there is no conflict among the circuits on the issue decided by the Fourth Circuit in this case. The instant Petition also should be denied, however, because the issue in question is not an "important matter" worthy or in need of the Court's attention.

Again, the question presented is whether a plaintiff who strategically or inadvertently sits on an objection to removal until after the case has been fully adjudicated by a federal district court should be deemed to have waived any objection to said removal in cases where the matter originally could have been litigated in federal court. This question is not an "important matter" because it involves only a very small group of persons and because the "harm" to that group

is negligible. The persons affected by this issue are only those plaintiffs who fail or decide not to object to removal prior to the entry of a judgment by the federal district court. The effect on these persons is that they are required to litigate their claim in federal court, where they could have chosen to litigate initially, rather than state court. In other words, the significance of the question presented is that plaintiffs who sit on their objections to removal are denied the right granted to them by 28 U.S.C. § 1445(c) to chose to litigate in state court rather than federal court.

Contrary to Wiley's rhetoric regarding the Tenth Amendment, this case is not about the Constitution, federalism or the jurisdiction of the federal courts. This Court held quite clearly in Horton that federal courts have subject matter jurisdiction to hear claims arising under the workers' compensation laws of the various states so long as the requirements of 28 U.S.C. § 1332 are satisfied. As a result, Wiley's statement that the Court must intervene to "prevent the federal district courts from hijacking state jurisdiction in cases that arise under the state workers' compensation laws" is as misplaced as it is melodramatic. The simple fact of the matter is that this case is about nothing more than how forgiving the federal courts should be to that small group of plaintiffs who, by reason of incompetence or strategy, fail or refuse to object to a removal prior to losing on the merits in federal court when the only "harm" suffered by them is that they have had to litigate the case in federal court, where they could have filed suit initially, rather than state court. Even if a conflict among the circuits does exist on this question, this is not an issue of sufficient importance to warrant intervention by the Supreme Court.

CONCLUSION

For the foregoing reasons, Wiley's Petition should be denied.

Respectfully submitted,

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